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"Courts, Power and Rights in Argentina and Chile"
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> *"La experiencia política y jurídica argentina indica que, durante casi un siglo, la gran mayoría de los presidentes argentinos gobernó el país mediante medidas de emergencia, con escaso control del Congreso o de la Corte."*
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> Adrián Ventura in *La Nación* (September 29, 2005).

ABSTRACT: Under what political conditions are judges more likely arbitrate political conflict over the use of power and to mediate the relationship between state power and individual rights? This paper examines these questions through a relatively narrow empirical lens with a focus on two kinds of constitutional controversies that have historically reached supreme courts: the judicial review of legality and constitutionality of presidential use of *exceptional authority* and the judicial protection of the *freedom of expression*. Whether judges choose to limit extraordinary power, protect cornerstone democratic rights, and/or acquiesce to presidents is in part a political story. The paper presents a historical comparison of judicial decisions in these two areas in Chile and Argentina and analyzes two central factors that potentially affect judicial decision-making: the relationship of judges to the president (political judicial ideology), and the salience of a fragmented political environment for affording judges the political security to check state power.

Introduction

The study of courts in Latin America in the context of re-democratization and democratic consolidation is part of a larger research agenda concerning various forms of government accountability (legal, electoral, social) (O'Donnell 1994; 1998a; 1998b; Przeworski, Stokes & Manin 1999; Schedler, Diamond & Plattner 1999; Mainwaring and Welna 2003; Peruzzotti & Smulovitz 2006). This literature recognizes the real disjuncture between rights protections and the formal rules governing policy-making on the one hand, and the 'lived' experience of social and political actors on the other. It also recognizes the fundamental role played by the judiciary in promoting legal accountability and the rule of law (Chavez 2004; Gargarella 2004; Smulowitz & Peruzzotti 2000). With the return of the democracy to the region, the judiciary *should* counter two 'dangerous tendencies' in Latin America: restrictions on fundamental democratic rights such as the freedom of expression; and the growth of centralized and unchecked presidential power (Gargarella 2004, 182). As

Ventura's quote above (concerning the Argentine presidency) suggests, however, the judiciaries of Latin America have not always countered these tendencies. Even in periods of constitutional democracy, presidential power to legislate by decree or utilize emergency measures has met only weak resistance from legislative and judicial branches.[1] In turn, unchecked power has a deleterious impact on individual constitutional rights, and in particular on those freedoms, such as the freedoms of expression, press, information and association, that are deemed critical for checking political power.

Under what political conditions are judges more likely arbitrate political conflict over the use of power and mediate the relationship between state power and individual rights? This paper addresses this question through a historical comparative analysis of the impact of internal and external conditions in the political environment on judicial activism against the executive in cases involving presidential use of *exceptional authority* and active judicial protection of the *freedom of expression* in Chile and Argentina. These two country cases exhibit markedly different historical relationships between the executive branch and the supreme court; yet judicial authority to review government action has expanded in both countries over the time period examined, roughly the 1940s to 2000. Over these six decades there is considerable variation in judicial response to presidential use of exceptional powers and rights protections evident, more variation perhaps than traditional accounts of Latin American courts (to the extent courts were considered relevant for study at all) predicted.[2]

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[1] Molinelli's (1991, 149) detailed study of congressional and presidential relations confirms the thesis of congressional weakness before the executive branch for the Argentine case. Other analyses Latin American politics broadly recount judicial and legislative weakness with respect to the executive branch: Gargarella 1996; Jorrín 1953; Karst 1975; Lambert 1971; Linz 1994; Nino 1993; O'Donnell 1994; O'Donnell 1998a; O'Donnell 1998b; Pierson 1957; Rosenn 1974; Rosenn 1987; Rosenn 1990; Schedler & Diamond & Plattner 1999; Stotzky 1993; Valenzuela & Wilde 1979; Verner 1984; Wynia 1995.

[2] Mecham (1967) writes in the 1960s, for example, that due to the political domination of the executive branch it is unnecessary to consider or study the legislative and judicial branches of government – both are subordinated to the executive. Two decades later Wynia (1984) notes that checks and balances between the three branches of government are more myth than reality in Latin America.

Section one below discusses the Argentina – Chile comparison with respect to the empirical record of court response in these two areas (exceptional authority and freedom of expression). The section concludes by placing Argentina and Chile along two dimensions: the extent to which the high court is 'activist' with respect to ensuring individual rights and the extent to which the high court functions as 'arbiter of power' (that is, limits political power). Whether judges choose to limit extraordinary power, protect cornerstone democratic rights, and/or acquiesce to presidents is in part a political story. Section two examines two central aspects of this political story: the relationship of judges to the president (political judicial ideology); and the salience of a fragmented political environment for affording judges the political security to check state power. Section two tests several clear empirical expectations that follow from these two approaches using a longitudinal database of judicial decisions in each country. Section three then turns to a discussion of this analysis. Several important caveats inform this discussion. First, there is no guarantee that, given such political space, judges will *prefer* to take on an active role with respect to reviewing government power or advancing individual rights. Second, is Shapiro's observation that that judges do not play the same role in every policy arena. In short, the mix of factors (political) that best help to explain judicial behavior toward the executive on questions of state power differs from those (ideological) associated with judicial protection of (or failure to ensure) fundamental rights.

1: Exceptional authority, freedom of expression and courts, a brief overview

This paper focuses narrowly on supreme court-executive relations in two areas: the use of exceptional authority (also termed here *emergency powers*) by presidents and the judicial protection of *freedom of expression* in two neighboring countries with starkly different histories of political inference in the judiciary. Chile is one of the few countries in the region

considered to have a fairly stable democratic history and 'working' institutions of legal accountability, including a supreme court free of overt political interference, in large part because presidential influence over judicial appointments is mediated by the court itself. Chile also stands out from its neighbors as having enjoyed stable tenure practices and consistent appointment and removal procedures. Argentina, on the other hand, is characterized by institutional instability, hyper-presidentialism, and severe supreme court politicization over time (O'Donnell 1998b). Judicial life tenure has not been well respected in Argentina; and nearly every government in the post war period has fashioned its "own" Court. Comparing high court judges in the two countries, Argentine judges most often resign or are removed from office, but Chilean judges tend to die in office or retire and enjoy nearly double the average tenure as their Argentine counterparts (Scribner 2004). Furthermore, the political dependence of the Argentine Supreme Court specifically is considered responsible for the concentration of power in the executive branch and weak judicial protection of individual constitutional rights (Oteiza 1994).

Presidential political and institutional dominance in Latin America has formal-legal origins and informal political roots. In Chile and Argentina these include significant expansions of presidential power under military regimes, the use of declarations of states of exception to limit individual liberties (and provincial authority in Argentina) over time, and the power to legislate in matters considered urgent (often with respect to economic emergency) during both democratic and authoritarian times. In turn, presidential domination of the political system has negatively impacted the quality of democratic representation and individual constitutional rights. The remainder of this section provides a brief overview of the comparative record of judicial response to constitutional and legal controversies concerning presidential use of exceptional authority and those concerning the

freedom of expression (and related rights or issues). The summary of judicial action/inaction in each of these key areas covers Chile from the Alessandri Presidency through the 1990s (1932-2000) and Argentina from Juan Perón's presidency through the 1990s (1946-2000).

Exceptional authority: Today the use of exceptional power by executives is no more unusual than it was half a century ago. Presidents invoke explicit or implicit police powers in response to a wide array of crises resulting from domestic and international political upheaval, severe economic disruption or natural disasters. During exceptional times presidents are vested with authority to temporarily restrict individual rights as a means to gain control over the immediate state of affairs. At these times, when other channels of accountability and moderation are closed, 'all eyes look to the high courts to restrain the impulses of power' (Gargarella 1996, 246). Unfortunately the widely held view of high courts in Argentina and Chile is that even in periods of constitutional democracy, presidential authority to suspend rights under states of exception has met with only weak resistance. The "…norm for the courts and legislatures [in Argentina, for example] has been abdication to the executive branch, either through active support or through inaction" (Banks & Carrío 1993, 6).

In tracing the judicial response to exceptional authority cases in each country, I focus narrowly on constitutional conflicts concerning three types of exceptional authority: states of siege (declared in response to internal or domestic political disorder), extraordinary faculties (legislative grants of emergency authority to the executive), and states of emergency. [3] These states of exception have been an historical fact for democratic and authoritarian

[3] Exceptional powers have very different formal-legal roots in each country and this, in turn, has impacted the kinds of powers asserted by presidents comparatively as well as the doctrines developed by judges in the wake of challenges to presidential actions. For example, in Argentina the *state of siege* (specifically) entails the possibility of more general rights restrictions than in the Chilean case, and has been widely utilized for addressing internal security concerns. The state of siege is the only constitutionally recognized exceptional

regimes since the early constitutional period in both Chile and Argentina. For example, in Argentina between 1862 and 1986 there were 44 declarations of state of siege under democratic governments alone—of these declarations, 64 percent were decreed by the president (Molinelli 1989). In Chile, which has one of the longest democratic histories in the region, during the 140 years between the 1833 Constitution and the *coup d'etat* of 1973 Chileans lived under state of siege or state of emergency conditions for a total of 12 years and 3 months (Garretón Merino 1987). In contemporary Argentine and Chilean history, from about the 1930s forward, the concept of 'national security' has been associated with internal or domestic order. In both countries, declarations of exceptional regimes have been justified by an internally focused national security doctrine. During democratic periods, states of siege, states of emergency and grants of emergency powers, were utilized and justified, sometimes paradoxically, as necessary to preserve democratic institutions and maintain the rule of law (Garretón Merino 1987).

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authority in Argentina. The Chilean Constitution(s), by contrast, also allows for legislative grants of emergency powers (*extraordinary faculties* necessary to defend the State, conserve the constitutional regime, or protect the domestic peace) that connote a wider scope exceptional powers (including restrictions on fundamental rights) than that envisioned by state of siege for Chile (Caffarena de Jiles 1957; Bravo Michell & Sharim Paz 1958; Mera & Gonzalez & Vargas 1987a; 1987b). All the major laws conferring extraordinary faculties on democratically elected presidents in Chile were introduced to Congress by presidential message. Until 1994 the Argentine Constitution did not explicitly recognize extraordinary legislative grants of power to the executive. Instead, economic and social crises have been confronted in Argentina, as they have in the United States, though the exercise of government *police powers* to ensure the general welfare or protect vital public interests. In the late 1980s through the 1990s Argentine Presidents Alfonsín and Menem responded to economic situations with a unique type of extraordinary legal measure: emergency presidential decrees with no legal foundation in emergency legislation passed by congress termed degrees of need of urgency. These were met with a good deal of legal criticism (Ekmekdjian 1989; García Belsunce 1993; Lugones, Garay, Dugo & Corcuera , 1992; Pérez Hualde 1995; Sagüés 1990) and subsequently DNUs were incorporated into the 1994 Constitution (Badeni 1994; Comadira 1995; Dromi & Menem 1994; Pérez Hualde 1995; 1997). Finally *states of emergency* were not constitutionally recognized in either country; however, military governments in both countries have applied states of emergency. In Chile, the 'state of emergency' as an exceptional regime was originally created by democratically elected governments to respond to security issues during the Second World War and subsequently widened to include 'internal commotion' justifications and used to confront internal conflicts (Caffarena de Jiles 1957; Mera & Gonzalez & Vargas 1987b). Chile's National Internal Security Law passed on August 6, 1958, permanently authorized the president to declare states of emergency without the express permission of congress (Schweitzer 1972).

During the last authoritarian governments in Chile and Argentina this national security doctrine underwent fundamental changes and was used to justify a total restructuring of state-society relations in both political and economic spheres. There has been significant criticism of both the Chilean and Argentine supreme courts for their performance under military governments with respect to the protection of fundamental rights. Tens of thousands of *habeas corpus* and *amparo* petitions were dismissed as the courts retreated from their constitutional role to protect individual rights in the face of tyranny.[4] Yet, the doctrines used and arguments marshaled by judges to either support or check the exercise of exceptional power under dictatorship are highly related to those employed under democratic times.

Legal challenges to exceptional authority either question the legality/constitutionality of the declaration of exceptional power or the individual measure from which the individual seeks liberation or redress (such as an order of arrest, detention, denial to enter or exit the country, duration of restriction, etc.). Supreme Court jurisprudence in these matters is complex and has varied over time in both countries; though in both countries there is a general, albeit non-linear, evolution toward greater judicial review of individual executive actions over time (Scribner 2004). In general, the legal, constitutional and doctrinal issues involved in the exercise of exceptional authority are similar for both regimes of exception (e.g. states of siege) and emergency or extraordinary legislation, each of which are justified by circumstances that create a 'state of need'. At the heart of legal and constitutional controversies in these matters are competing interpretations of the constitutional limits of executive power and the constitutional relationship between individuals and state power.

[4] In Chile under the military government the Supreme Court rejected all but ten of the 5,400 writs of *habeas corpus* filed by the Vicaría de Soldaridad between 1973 and 1983. On Chilean Supreme Court acquiescence see: ICJ (1992), Vaughn (1993), Vargas Viancos (1995), and Jon M. Van Dyke & Gerald W. Berkley, Redressing Human Rights Abuses, 20 *Denver Journal of International Law and Policy* 243, 249-51 (1992).

Most challenges to the use of exceptional authority involve executive measures that result in individual rights violations, arrests, and detentions. Thus the writs of *habeas corpus* and *amparo* are the most common avenue to redressing these kinds of violations to individual rights, and typically cases reach the supreme courts on appeal.[5] Additional avenues for redressing rights violations include the 'writ of protection' (*recurso de protección*) in Chile and the 'extraordinary writ' (*recurso extraordinario*) in Argentina, which also reach the highest court though an appeals process (Nogueira Alcala 1999; Soto Kloss 1982; 1986; Morello 1999). While both supreme courts have generally upheld that writ of *amparo* proceeds as the ultimate recourse available to individuals to protect personal liberty, the Argentine Supreme Court has been much more jealous of its constitutional competency (especially under authoritarian regimes) to safeguard individual rights than has the Chilean Supreme Court (Scribner 2004; Peña González 1997). Moreover authoritarian regimes often placed important limitations on the ability of individuals to seek redress in the courts and also placed the judicial authority in the awkward position of having to reconcile revolutionary acts with the national Constitution. In Chile, under the Pinochet regime measures enacted under extraordinary faculties authority were not susceptible to *any* judicial recourse except that of *reconsideration* before the appropriate administrative authority.[6] The Supreme Court found that the application of the writs of *amparo* and protection were limited by this disposition (Silva Bascuñán 1986; Peña González 1997; Hilbink 2007).

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[5] In Latin America, d*erecho de amparo*, which can also be an *acción* or *recurso*, was first established in the Mexican federal constitution (1857 articles 101 and 102) as a way to protect all individual rights with constitutional character. Similar institutional mechanisms are Brazil's *manadado de segurança* (termed in Spanish, mandamiento de amparo); Chile's *recurso de protección* (article 20 of the 1980 constitution); Colombia's *acción de tutela* (1991); and the Chilean, Costa Rican and Argentine *amparo.*

[6] Under transitory Art. 24, the executive power to arrest and detain individual under the state of siege was widened. No specific motive was required to carry out an arrest and individuals could be detained for up to five days without having been formally charged with a crime. This could be extended another 15 days in the case of terrorist acts, for which the executive was not required to offer proof.

In Argentina early jurisprudence tended to shy away from review of executive action on separation of powers ('political questions') grounds. However, in the late 1950s the Supreme Court gradually developed a two-tiered reasonability (proportionality) test that allowed the Court to consider the relationship between the liberty affected and the government's stated justification and goals behind a given state of siege declaration (Kartheiser 1986).[7] Most often the court found challenged executive acts to be neither unreasonable nor arbitrary, thus individual presidential actions in these cases did not merit judicial control. However, in the 1970s the Argentine Court extended its reach of constitutional review of executive action. The court argued that, with respect to the use of exceptional authority to restrict individual rights, *only* those constitutional rights whose exercise poses a real and present danger under *current circumstances* may reasonably be restricted, and those restrictions must be proportional to the stated goals of the original declaration of the state of siege.[8] The same reasoning has been utilized by the Argentine Supreme Court with respect to extraordinary authority exercised in response to social and economic crises.[9]

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[7] In the landmark 1959 case "*Sofía, Antonio y Baquero, Fulvio L."* (*Fallos* 243:504; 22-May-59) the majority established measures affecting constitutional rights other than personal physical liberty might be subject to a judicial test of reasonability that allowed the Court to review executive acts that are *manifestly unreasonable or arbitrary*. The ruling is typical of a strategy employed by the Argentine Supreme Court that Gargarella (1996) and Groisman (1997) separately describe as judicial support of executive power while at the same time conserving or expanding the Court's capacity to ultimately exert control over executive acts. This is indicative of a 'soft-review' strategy as discussed by Epstein Knight & Shvetsova (2001).

[8] Bidart Campos (1994) times the initiation of this more expansive doctrine with the majority decision in "*Mallo, Daniel"* (*Fallos* 282:392; 10-May-72).

[9] An important example is the landmark case "*Peralta, Luis Arcenio y otro c/ Estado Nacional*" (*Fallos* 313:1513; 27-Dec-90). In the 1990 "*Peralta"* ruling the Supreme Court held that the emergency conditions existing at the time the DNU was dictated permitted a reasonable interference and restriction on property rights (Dromi & Menem 1994). In its ruling the Court relied on the United States Supreme Court decision in "*Home Building & Loan Association v. Blaisdell,"* 290 U.S. 398, 426 (1934), which was decided in the midst of the great depression and supported the emergency measures involved in the case. Just one year later the U.S. Supreme Court reversed its stance as the conservative "Lochner" era began to take shape. Other cases in which a similar "emergency doctrine" is applied include " Camps" (LL, T1987-D, p 185 – validating the Law of Due Obedience with arguments that included the existence of a grave military crisis), "*Videla Cuello*" (LL, T1991D, p. 518 – validating a suspension of judicial sentence against the State for a period of two years), "*Cocchia*" (*Fallos*

In the Argentine case there is a clear evolution of doctrine over time with respect to exceptional authority. In particular, the Argentine Supreme Court applied a reasonability test to detention and other measures affecting physical freedoms beginning in the mid 1970s. However, there is quite a bit of variation with respect to the application of the doctrine and the assertive position on judicial review of executive action found in the doctrine emerging in the 1970s was not comprehensively or consistently applied under the military regime (Bergalli 1984).[10] In Chile, such judicial assertiveness occurred, but was rare in pre-1973. Examples include decisions such as "*Antonio Aparicio H.*" (*GAT*, 1946, 2.2.414; 9-Jul-46) and "*Antonio Ferrán Sabaté"* (*RDJ*/1953:2.4.171, 2-Oct-53).[11] However, under the military regime the Court retreated into formalism. The Chilean Supreme Court's general stance toward habeas corpus and *amparo* cases brought against the military regime was similar to that of the Argentina Supreme Court before the gradual shift to the application of a reasonability test to

316:2624, 2-Dec-93), and "*Video Club Dreams*" decided 6 June 1995 in which the Court found the President's DNU creating a new tax (and therefore invaded legislative attributes) could not be justified by an emergency or grave social risk (Gelli 1995; Sagüés 1996).

[10] Bidart Campos (1994) notes that for Argentina the move to this doctrine for cases involving physical liberty began in the late 1970s with the case "*Pérez de Smith"* (*Fallos* 297:338; 19-Apr-77 and *Fallos* 300:832; 20-Jul-78), which was followed by "*Zamorano"* (*Fallos* 298:441; 9-Aug-77 and *Fallos* 298:685; 15-Sep-77) in which an executive order of detention under state of siege was challenged—the Court's decisions solidified its competency to review of the reasonability of executive acts. Other examples include: "*Tizio"* (Fallos 299:294; 15-Dec-77) and "*Timerman"* (Fallos 300:816; 20-Jul-78 and 301:771; 17-Sep-79) concerning arrest and detention; "*Moya"* (Fallos 303:696; 2-Apr-81) and "*Solari Irigoyen"* (Fallos 305:269; 11-Mar-83).

[11] The Chilean Supreme Court held in "*Antonio Aparicio H.*" (*GAT*, 1946, 2.2.414; 9-Jul-46), for example, that it could review the reasonability of individual executive acts under exceptional authority. The case concerns a Spanish citizen who was expelled from Chile by decree of the Minister of Interior for having participated in political activities. The individual sought recourse in the courts through the writ of *amparo*. When the Court solicited a report on the case from the General Direction of Investigations it became clear that there were no facts substantiating the government's claim of political activity. The Court argued that even though the *Law of Interior Security* gave special faculties to the Minister of the Interior to arrest and expel foreigners by simple decree, this authority was not absolute given that individual liberty is guaranteed in the Constitution and that the judiciary must intervene to protect this fundamental right when it has been harmed. Consequently justices are not inhibited from entering into questions concerning the facts and background that the administrative authority feels justifies the expulsion. In the *Ferrán* decision, the Court limits itself to accepting the writ of *amparo* and ordering the liberation of Ferrán S., it leaves the decree of expulsion valid ostensibly for separation of powers reasons, invoking Art. 4 of the Constitution (Mera & Gonzalez & Vargas 1987a).

exceptional measures (ICJ 1992; Mera & Gonzalez & Vargas 1987b; Peña González 1997; Rio Alvarez 1990).

Freedom of expression: Restrictions on expression are a key mechanism by which executives have maintained political dominance and stifled opposition during both democratic and non-democratic times.[12] The right to freedom of expression and opinion is generally considered a cornerstone of democratic society: a right whose enjoyment demonstrates the extent to which all other human rights contained in international instruments are enjoyed (HumanRightsWatch 1998; Levit 1999). Freedom of expression includes the right to seek and receive information as well as the right to express and impart information. Thus freedom of expression cases include those concerned with the freedom of the press (criminal libel, defamation and prior censorship), the relationship between freedom of expression and public order, the relationship between expression and the right to personal or institutional honor and privacy, rights to information, the right of reply, and censorship of all forms of media (print, film, television, and artistic expression).

In both Chile and Argentina freedom of expression historically has received constitutional recognition. However, Chilean law is formally more restrictive than Argentine law and still contains some of the most restrictive provisions of the exercise of freedom of expression in the hemisphere (Lanao 2002; Lauvsnes 2006). Legal provisions governing criminal defamation, contempt of authority, and prior censorship date back to the Law of Defense of Democracy (1948) and the State Security Law (*Ley de Seguridad de Estado*) (1958), and have been shored up in the criminal code and the military code (González & Martínez 1987; González 2000;). Article 6(b) of the State Security Law bans "insults and contempt"

[12] Restrictions on freedom of expression are explicitly included in the various types of exceptional power, however such restrictions are not exclusive to non-democratic or exceptional political circumstances in either country.

of "the President of the Republic, Ministers of State, Senators or Deputies, members of the Higher Courts of Justice, Controller General of the Republic, Commanders-in-Chief of the Armed Forces and the General Director of the Carabineros" (Lauvsnes 2006, 50). Article 6(b) has been the most often utilized mechanism (under both democracy and dictatorship) to restrict freedoms of expression through the criminalization of defamation (Lanao 2002). González (2000) argues that, while there is some variation, the Chilean Supreme Court by and large has responded to cases of criminal defamation, by perceiving defamatory statements involving public authorities as simultaneously a threat to public order (under the State Security Law). This view continued through the 1990s (Medina 1996).[13]

The Chilean Court, likewise, has a mixed but conservative record when it comes to balancing the freedom of expression (in particular insults or *desacato*) and rights to honor, reputation and privacy provided in the 1980 Constitution. In several cases this 'balancing act' has resulted in judicial prior censorship (Banda Vergara 1999; Zúñiga Urbina 2000).[14] Moreover the Court's stand on prior censorship of cinema (also recognized in the 1980 Constitution) was the subject of intense debate in the 1990s and an IACHR decision against Chile (following the Chilean Supreme Courts' decision in 1997 to prevent the showing of the film *Temptation of Christ).*[15] In Chile, prior censorship and continued criminal defamation restrictions on freedom of expression violate international standards regarding free speech and expression well into the present decade. Some aspects of the legal regime in Chile have

[13] For example cases: 1994 *Juan Andrés Lagos* and *Francisco Herreros,* 1996 *Barrios, Aravena* and *Cuadra.* In 2007 the Constitutional Tribunal decided its first freedom of information case *(Casas Cordero et al v. The National Customs Service;* Rol Nº 634-2006*)* issuing a decision that found the right of access to government information is protected by the constitution's guarantee of freedom of expression (this followed the jurisprudence established by the IACHR in *Claude Reyes et al v. Chile.*

[14] *Martorell, Tentación de cristo, EL libro Negoro de la Justicia Chilena.* Ruiz-Tagle Vial (1998-99) in his commentary on Donoso *Arteaga y otros contra revista CARAS* (recurso de protección, Corte Suprema 1998) suggests that the *Caras* decision presents an alternative method (a proportional analysis) to balance the right to honor and privacy and freedom of expression.

[15] Chile eliminated film censorship in 2002.

subsequently been reformed;[16] however, criminal defamation cases continue to run afoul of international (IACHR) standards.[17] Overall, the Chilean's courts are reluctant to enforce and protect rights generally (Couso 2004; Hilbink 2003, 2007).

Comparatively, the Argentine legal regime concerning restrictions on freedom of expression and information has never entailed the kinds of restrictions inherent in Chile's long standing (and long applied) State Security Law (Lanao 2002). Lauvsnes (2006, 53) notes, in a comparative study of criminal libel and defamation in the 1990s, that compared to Chile, such libel and defamation cases in Argentina have more often "involved the executive and his associates who have responded with court proceedings when statements caused 'moral damage.'" As in Chile, defamation laws defamation law represent the gravest impediment to freedom of expression and opinion. Following the Horacio Verbitsky's conviction by the Argentine Supreme Court in 1992, for violating Argentina's insult law, defamation and *desacato* laws became a lightening rod for civic action in support of freedom of press and expression, and in 1994 the Argentine Congress repealed the insult provisions from the criminal code and adopted the absolute malice standard of *Times v. Sullivan* (Lanao 2002).[18]

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[16] In 2005 constitutional reform eliminated defamation as an offense against public persons, and *desacato* (disrespect) laws were removed from the penal code (though it remains in the code of military justice) (Freedom House 2007). "In August 2008 President Michelle Bachelet enacted a law that creates an independent Council for Transparency. The four-person council will be empowered to order officials to make information available to the public, as well as to impose sanctions if they fail to do so. The law is due to enter into force in April 2009" (Human Rights Watch 2009).

[17] For example, the Chilean Supreme Court found journalist Víctor Gutiérrez guilty of criminal defamation for 'defaming' Cecelia Bolocco (Carlos Memen's ex-wife) in October of 2008; reportedly Gutiérrez was planning on an appeal to the IACHR (Committee to Protect Journalists, *Chile: Supreme Court upholds defamation decision*, 31 October 2008. Online. UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/4919a9ab2d.html [accessed 8 February 2009]).

[18] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) which established that a public official plaintiff must prove "that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." for a defamation claim to succeed. The Argentine Supreme Court has also applied the absolute malice standard in *Sola, Joaquin Miguel s/injurias and Ramos, Juan Jose c/LR3 Radio Belgrano y otros.* But reversed itself in *Menem, Eduardo* (1998) (see Gargarella 2004, page 190 for a brief discussion).

Argentine jurisprudence on prior censorship and criminal defamation has also been quite varied over time in Argentina (Pellet Lastra 1993; Sagüés 1997; Bianchi & Gullco 1997). With respect to prior censorship, for example, the Court has long recognized sometimes recognized the right to publish without prior censorship as qualified (by the ability of the state could use its police power to preserve public morality, good mores, order and public security). This is the position taken for example in *Editorial Sur*, 257 *Fallos* 275 (1963) and in *Mallo*, 282 *Fallos* 392 (1972).[19] The Court, changed this doctrine and argued that "the true essence of freedom of the press resides fundamentally in the recognition that all men enjoy the right of publishing their ideas in the press without prior censorship, that is, without the previous control by the authority of what is going to be said" (*Calcagno*, 269 *Fallos* 195, 1967) (quoted in Sagüés, 1997).[20] Yet, freedom of expression (publication and dissemination) remains qualified by courts, which have increasing, particularly in the 1990s, engaged in judicial prior censorship (Sagüés 1997; Vittadini Andres 1999).[21] With respect to defamation, slander and libel (considered, as in Chile, as crimes against honor), "[t]he dignity of politicians is assiduously defended by the Argentine judiciary (Vittadini Andres 1999, 172).[22] Lauvsnes (2006, 66) describes the Argentine Court's jurisprudence on criminal defamation as "confused" and notes that the "doctrines surrounding the freedom of expression seem to be, at least, underdeveloped, both in terms of resolute application and consistency with international human rights standards."

[19] Specifically concerning obscenity and protection of public morals.

[20] This statement in was cited in *Prensa Confidencial* and again in *Sanchez Sorondo.*

[21] Examples include *Servini de Cubria*, CSJN, 315 Fallos 1943 (1992).

[22] See: *Ponzetti de Balbin* 306 Fallos 1982; in *Campillay* the Court rules that authorities must refrain from interfering with freedom of press except in cases which transgress human dignity (*See* Miguel Angel Ekmekdjian, "La Doctrina del Fallo "Campillay" Otra Vez en Juego," in *Rev. Juridica El Derecho*, Mar. 30, 1995).

In short, while scholars note consistent judicial conservativism toward rights in Chile (Couso 2004; Hilbink 2003, 2007), there is a good deal more variation in the Argentine case (Sagüés, 1997; Vittadini Andres 1999; Bidart Campos1994). These patterns are evident in simple summary statistics of court decisions the critical areas of *exceptional authority* and *freedom of expression*. The quantitative summary of decisions presented below draws on a longitudinal and cross-sectional database of judicial decisions in each thematic area from the 1940s through 2000 (Scribner 2004). The time frame covered includes multiple changes of government and opposition and includes both democratic and authoritarian periods of governance in both countries. The database includes all relevant published Supreme Court decisions in both countries during the time period and is as exhaustive as possible. Only those decisions that met three basic criteria were included in the database: 1) they were published as a full decision, which means they were signed by all participating judges and include the entire text of the majority, dissenting and concurring opinions; 2) the central question in the case presented an explicit challenge to *exceptional authority* or *freedom of expression*;[23] and 3) the court's decision on that challenge was unambiguous. In Argentina, I selected only those decisions meeting these three criteria that were published in the official Court record (the collection of *Fallos de la Corte Suprema de Justicia de la Nación*). The Chilean Supreme Court does not maintain an official record of Court decisions; therefore, I selected

[23] The data base includes the follow types of freedom of expression cases in both countries: *libertad de expresión, opinión, información, prensa, imprenta, o palabra; honra; desacato, desafuero de parlamentarios por desacato al presidente o un ministro; delitos de abuso de publicidad; censura previa; censura cinemática o en el ámbito del radiodifusión y/o televisión; y derecho a reunión cuando el caso se trata de expresión política.* For exceptional powers, included cases are constitutional or legal challenges to the three types of exceptional powers discussed above. In some cases that executive measures restricting freedom of expression is justified by exceptional authority.

decisions meeting these criteria and published in one or more of the three leading legal journals: *Revista de Fallos del Mes, Revista de Derecho y Jurisprudencia*, and the *Gaceta Jurídica*.[24]

The following table summarizes court decisions (coded as 'favorable' to the president's position on exceptional power and 'favorable' to the protection of freedom of expression) in explicit challenges to exceptional authority used to confront *political, social* and *economic* crises under democracy and dictatorship as well as cases involving various freedom of expression matters.

Percent of Court Rulings in favor (Chile: 1932-1999 ~ Argentina: 1946-1999)

	Exceptional Power		Freedom of Expression Press	
Overall	Chile (N=177)	Argentina (N=147)	Chile (N=111)	Argentina (N=127)
During Dictatorship	79% (N=130)	64% (N=73)	40% (N=37)	38% (N=29)
During Democracy	45% (N=47)	80% (N=74)	54% (N=74)	50% (N=98)

Several broad comparisons stand out in this summary. First, there is a clear divergence in the direction of rulings, particularly on cases of exceptional authority, depending on the regime type. The two countries display remarkably different outcomes with respect exceptional power, with the Argentine Court equality likely to find against the executive under dictatorship as the Chilean Court is under democracy.[25] For cases

[24] While this database is as exhaustive as possible in capturing all cases that meet the above criteria, there are clear limitations to method of data collection method. Publication of cases in Argentine *Fallos,* as well as the publication of decisions in Chilean law journals, represents only a fraction of cases actually decided by both courts; thousands of cases are simply never published at all. Moreover inclusion for publication is subject to (unknown) criteria of the editors of these publications. Publication of cases under the Pinochet regime in Chile, in particular, may be biased. In response to these data limitations, one could lament the poor state of the judicial record keeping and lack of historical comparative data and reject the possibility of systematic comparative and longitudinal study of law and politics altogether. Instead, this analysis keeps these constraints in mind and where possible seeks out comprehensive qualitative studies in both countries that provide evidence that confirms, disconfirms and otherwise informs the story presented by the comparative data.

[25] The overlap of exceptional authority with freedom of expression attenuates the regime differences to some extent. In Argentina during democratic government the Supreme Court ruled against the freedom of expression or press claim in about 68% of cases when a state of siege was in effect. In non-democratic

involving freedom of expression, in both countries more cases are decided under democratic conditions and these more often are decided in favor of protecting free expression. Moreover, both national courts broadly protect the right to free expression more often under democratic conditions (but the gap is narrower).

The above discussion and brief summary provides some rough indication for the placement of Chile and Argentina along two dimensions of judicial activism (or lack there of). In neither country, however, does the role of court appear to be fixed or coherent over the broad time considered here. Moreover, broad trends in decision-making do not incorporate well fluctuations in doctrine, the pace of change or up-take of international rights-based doctrine, or expansions and contractions of judicial review competency. The next section turns to potential explanations for judicial behavior in both countries along these two dimensions.

		Ensure individual rights (Activist)	
		Yes	*No*
Limit other political actors (Arbiter of power)	*Yes*	Argentina *(sometimes)* Chile *(sometimes-weakly)*	
	No		Argentina *(sometimes)* Chile (*most often restrained*)

What conditions facilitate court decisions that hold presidential power to constitutional limits and/or allow judges to perform as effective guardians of fundamental constitutional rights, such as the freedom of expression? Is high court action against the executive branch a sign of presidential weakness or a show of Court strength? What does

conditions the Court ruled 72% of the time against the freedom of expression during a legal state of siege. Under both democratic and non-democratic governments, in the absence an effective state of siege declaration, the Court ruled against the freedom of expression only about 45% of the time. Under periods of state of siege in Chile, the court found against the freedom of expression about 59% of the time; in the absence of a siege, that number drops to 46%.

the political relationship between the Court and executive power indicate for the protection and expansion of freedoms in the region? Whether judges choose to limit extraordinary power, protect cornerstone democratic rights, and/or acquiesce to presidents is in part a political story. Below I attempt to parse out aspects of that political story by focusing on the relative explanatory salience of a fragmented political environment for affording judges the political security to check state power. I utilize the longitudinal database of judicial decisions in each country described above to assess competing explanations for judicial decisions making.

2: Judicial decision-making; assessing (part of) the *political* story

The judicial politics literature highlights two central ways in which politics 'matters' for court decision-making and may explain the proclivity of courts to defer to the political branches or engage in active judicial review. One position is to see judges as fundamentally *unconstrained* by political forces; as such judges vote according to their ideological, political, or legal policy preferences. Politics seeps into judicial decision-making via the political and ideological positions that appointed judges bring to the court. The attitudinal model posits "that the [U.S.] Supreme Court decides disputes in light of the facts of the cases vis-à-vis the ideological attitudes and values of the justices" (Segal & Spaeth 2002: 87).[26] The attitudes judges bring to the court with respect to checking state power and protecting or developing individual rights may be politically tied to the appointing president (e.g. *Menemista* appointees to the Argentine Supreme Court) or ideologically tied to the judge's background characteristics (including a conservative institutional ideology, as in the Chilean case (Hilbink 2007). In either case, it is the composition of the court, and judges' political and/or

[26] The attitudinal model has been most effective in explaining United States Supreme Court judicial behavior in leading civil liberties and economic rights cases in which ideological alignment clearly correlates with judicial voting on the controversy at hand (Segal & Spaeth 1993; Segal & Spaeth 1996; Segal 1997).

ideological views, that affect decision-making. A good deal of executive manipulation of the Argentine Court has been aimed precisely at getting the 'right', politically or ideologically, judges on the court. If judges are politically unconstrained, and rule (at least partially), as this approach suggests, according to their political-ideological views, then we would expect that a judge's relationship the appointing and current president or party would influence judicial decisions on questions of power or rights.

In Chile, scholars have attributed judicial passivity of the courts to a judicial culture of legalism and institutional and ideological conservatism (Hilbink 2007). Chile's formalistic and positivist legal training, combined with a rigid judicial hierarchy and Supreme Court's discipline and promotion power, have reinforced the social and political isolation of the Chilean judiciary, and promoted a historically consistent antipathy toward constitutional review, a persistent understanding of statutory law as supreme, and a private law perspective on questions of constitutional rights (Peña González 1997; Couso 2004; Hilbink 2007). The expectation is that Chilean judges will defer to government questions concerning public law, such as the nature and limits of exceptional authority and the protection of freedom of expression or constitutionally recognized rights (other than property rights) (Hilbink 2007). Moreover, since the dominant (conservative) institutional ideology of the Chilean judiciary has been frozen since at least the 1920s, and perpetuated by political isolation, we might expect ideological congruence and consistency across the whole time frame studied here, such that who (which president or party) appoints judges should not affect judicial decision-making.[27] These expectations about the explanatory strength of the political-ideological relationship of judges to their appointing and current presidents are evaluated below.

[27] Cumplido and Frühling (1979), argue continued judicial deference has its roots in three main aspects of Chilean judicial culture: (a) that judges hold a particular conception of formal judicial independence as equivalent to political and social isolation; (b) that judges perceive their role as applying the law as it is handed

The second theoretical approach to how 'politics' may explain the proclivity of courts to defer to the political branches or engage in active judicial review views judges as *constrained* by political forces, either explicitly due to court-curbing policies or intrinsically by the desire of judges to maintain the institutional legitimacy of the Court. Judges may have a variety of policy preferences they seek to impose on the greater community, but they are constrained by public opinion and dependent on the elected branches of government to support and implement court policy and thus do not venture far from majority political preferences (Dahl 1957). Separation of powers approaches to Supreme Court decision-making as developed in the United States literature, have been successfully applied to the Argentine case (Helmke 2005; Iaryczower, Spiller & Tommasi 2002; Scribner 2004). These accounts center on the idea that legal policy outcomes are a function of the dynamic interaction of all three branches of government (Epstein & Knight 1998; Epstein,Knight & Shvetsova 2001).

Judges desire to further their individual goals and are forward-thinking and face incentives to decide cases within the policy 'comfort zone' of the legislative and executive branches because the cooperation and good will of those branches are necessary to implement court decisions. If pushed beyond that comfort zone, the elected branches may coordinate to initiate and/or pass court curbing policies that may damage the institutional legitimacy and integrity of the court, or the individual careers of its members. When judges and governments are politically aligned, judges need not worry about such political maneuvers, presumably because all actors agree with one another. Support for the president may result simply because judicial preferences coincide with those of the political branches. However, when the preferences of judges depart from those of the current government—

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down; and (c) that judges hold a non-democratic conception of the judicial branch such that the existence of the judiciary as a power is not dependent on the existence of a democratic political regime.

typically because the government has changed hands and holdover judges occupy the Court—judges may find they need to strategically compromise their position on a judicial ruling. Public support resources available to courts in their attempt to balance against the other powers also affect the calculations of judicial actors (Vanberg 2005; Staton 2002; Caldeira & Gibson 1992). Broadly, separation of powers studies of judicial behavior indicate that judges are more likely to be bolder (act as an arbiter of power) vis-à-vis the other branches of government when government is divided, politics is competitive or transparent, the court enjoys popular legitimacy, or alternation from government to opposition is likely.

One of the key findings in this literature is that political fragmentation (particularly divided government) affords judges greater political room for maneuver and may increase the probability that judges will limit presidential excess and/or protect individual rights (Eskridge 1991a; 1991b; Segal 1997; Gely & Spiller 1990; Iaryczower Spiller & Tommasi 2002; Scribner 2004; Ríos-Figueroa 2007). Conversely, if the president enjoys majority congressional support, this political space for judicial maneuver shrinks, and judges (particularly those not politically or ideologically aligned with current the president) may strategically support the executive position rather than risk some form of reprisal by the executive or his political supporters in congress. Below I examine these competing (judges as politically unconstrained, as outlined above, vs. potentially constrained by a complex institutional-political context) explanations for judicial decision-making using the comprehensive data set of Supreme Court decisions in both countries described earlier.

The dependent variable is the direction of the decision on the substantive issue (exceptional authority or freedom of expression). Because the two key theoretical approaches discussed above focus on the decision of individual judges, each judge's decision is coded separately, as was the court ruling as a whole. These votes are binary, coded 1, in this case, if

the judge rules to *check* exceptional authority as questioned in the concrete case, or to *ensure* protection of the freedom of expression, and 0 if not. I use logistic regression analysis to examine the factors that affect the probability that an individual judge rules to either check power or ensure rights. To interpret the results I calculate the differential effect on the probability an individual judge would *check power* or *ensure rights* given discrete changes to particular variables of interest holding other variables to their mean (continuous variables) or median (dichotomous variables). Several expectations follow from the previous discussion and are evaluated below.

First, if the political ideology of judges (measured here by each judge's *appointment* relationship with the sitting president and alternatively by *proportion of the bench* appointed by the president at the time cases are decided)[28] explains variation in whether judges act as arbiters of power and/or ensure individual rights, then:

a) In Argentina *judicial appointment*, and/or *proportion of the bench* should be significant, judges *not* appointed by the president should to be more likely to *check* exceptional authority, and *ensure* rights to free expression.

b) In Chile, (where we would expect judges to be ideological clones of each other across the time frame, as well as politically isolated generally) *judicial appointment*, and/or the *proportion of the bench* appointed by the president should have no effect.

Second, if political fragmentation provides judges with the political space act sincerely, and, conversely majority coalition and/or party support restricts that political space and fosters incentives for strategic action, we might expect judges to defer to presidents who

[28] The study of Sunstein et al. (2004) indicates that a judge's vote, in ideologically challenging areas (such as freedom of expression) may be predicted by the party of the appointing president; the judge's ideological viewpoint will *intensify* if he/she is shares the bench with two other judges appointed by same president (or same political party as the president), and, alternatively, the judge's ideological position will weaken in the absence of a similarly appointed judge on the court (cited in Lauvsnes 2006).

enjoy sufficient political resources to respond to a negative ruling in such a way that would challenge the institutional integrity of the supreme court. 'Sufficient' congressional support is considered as majority party or majority-coalition support in both houses and *political fragmentation* as lack of that support. Furthermore, it is the judge who is not appointed by, and not politically-ideologically aligned with, the sitting president who is most under pressure to abandon his/her 'sincere' preferences and side with a president that enjoys majority or majority coalition support; where as the judge appointed by the President may sincerely support the executive position regardless of the nature of government. I constructed an *interaction* variable to reflect the combined effect of the nature of government and the appointment relationship of the individual judge with the sitting president. In short, we might then expect:

c) *Political Fragmentation* should be significant, and positive for exceptional authority, and significant and positive in the case of freedom of expression in both countries, positively affecting the probability that an individual judge rules to *check* power or *ensure* rights.

d) *Interaction* should be significant and positive, in a context of political fragmentation, judges *not* appointed by the president should be more likely *check* power or *ensure* rights.

Several control variables are included in the analysis. *Regime type* is especially important comparatively. As highlighted earlier, especially with respect to exceptional power, decisions *checking* exceptional power have been more prevalent under democratic government in Chile; while in Argentina control of exceptional power is greater under dictatorship. Similar patterns have been found for the Argentine case by Helmke (2005) and Iaryczower, Spiller and Tommasi (2002) each using a different data set of Supreme Court

decisions. The greater willingness of Argentine judges to check executive power under dictatorship versus under democracy owes much to the degree to which the Supreme Court has been open to political pressure and manipulation. The Argentine Court has been as, if not more, politicized during democracy than during dictatorship. In Chile, by contrast, the tripartite electorate and a long history of 17 minority presidents, has insured somewhat greater institutional security under democracy. Likewise, there existed an ideological affinity between the military and the majority of Chilean Supreme Court members, who largely welcomed the overthrow of the Allende regime (Frühling 1986).

A second control is whether a *state of siege* was in effect at the time of the Court's decision (coded 1). When a state of siege, specifically, is in effect we might expect a less judicial *checking* of presidential authority. A declaration of state of siege indicates that exceptional circumstances do exist on some level (political unrest, economic disorder, terrorist activities, etc.). Moreover, the courts in both countries have been reticent to overstep their institutional bounds by taking up the "political questions" surrounding state of siege declarations. Additional control variables include the *date* of the case (to capture subtle progressive changes associated with post-war modernization); the *importance* of the case, and whether the action or power questioned in the case was relevant or *contemporary* for the current president (coded 1), or pertained strictly to the previous government (coded 0). Larkins (1996) asserts that high courts may be more likely to rule against the executive branch when controversy at hand is trivial or concerns a former president. The "importance" or significant of the case is captured in the data base by coding decisions as especially important if there are identified by the wider legal community as 'leading cases' in the specific legal area either because move doctrine in a new direction, or alternatively the court missed an opportunity to do so. Roughly half of the cases are considered doctrinally

important in each country in both legal areas; and a larger proportion, but not all, are contemporary to the sitting administration.

The results (tables 1 and 2 in the appendix) of the multivariate analysis indicate mixed support for the expectations summarized above, including the importance of regime type (as also evidenced in the summary statistics).[29] According to the judicial ideology approach, judges are unconstrained by external political factors and free to decide cases according to their political, ideological, or legal preferences. We would expect judges *not* appointed by the president to be more likely to *check* exceptional authority, and *ensure* rights to free expression. The results support these expectations for Argentina in both areas. Argentine judges *not* appointed by the president are 8 percent more likely to *check* power and 11 percent more likely to *ensure* rights. In Chile, due to the stability, breadth, and replication of a conservative apolitical institutional ideology, the expectation is that a judge's *appointment* relationship with the sitting president or alternatively by *proportion of the bench* appointed by the president would be irrelevant for judicial-decision making. That is basically what the data suggest, particularly for freedom of expression cases. However, for exceptional authority challenges *appointment* and *proportion of the bench* are in the expected direction and *appointment* is just shy of significance. Judges who were not appointed by the sitting president are just 6 percent more likely to *check* power than their presidentially appointed colleagues, all else equal.

[29] All logit models use STATA 6.0; and calculations of probabilities and their confidence intervals use Clarify (King Tomz & Wittenberg 2000). Courts are collegial bodies and there is some risk that the analysis violates the assumption that individual judges' votes are not independent of one another; if so the number of observations may be overstated and the standard errors understated. I did not find evidence of auto-correlation among judges' votes, or evidence of heteroskedasticity among the error terms for the logistic estimations of individual votes.

Turning broadly to the 'constrained court' approach, the specific expectations regarding fragmentation predicted that *political fragmentation* would be associated with a greater probability that a judge *checks* power or *ensures* rights. Moreover, it is the judge who is not appointed by, and not politically-ideologically aligned with, the sitting president who is most under pressure to abandon his/her 'sincere' preferences and side with a president that enjoys majority or majority coalition support. These expectations are met in the Chilean case for exceptional authority, but not for freedom of expression. In the Chilean case a discrete change from majority coalition or party support for the president *to political fragmentation* in a 56 percent increase in the probability of vote to *check* exceptional power. Additionally, given a judge who is not appointed by the president, moving from a context of *political fragmentation* to one of majority coalition support for the president increases the probability of vote to *uphold* exceptional authority by 37 percent.[30] In Argentina the results indicate some weak support for expected impact of political fragmentation on decision making; the associated variables are in the expected direction and *political fragmentation* is just shy of significance for exceptional power. This relationship, as in the Chilean case, does hold for freedom of expression cases.

3. Discussion and tentative conclusions:

Judges endowed with judicial review authority have become the trustees of a global conception of democratic government as limited by constitutional and transnational mandates in which citizens' rights receive judicial protection and government action is rendered legitimate, accountable and predictable (Beatty 1994; Bobbio 1996; Cappelletti 1989; Fix-Zamudio 1995; Lijphart 1999; O'Donnell 1998a; Schedler 1999; Tate 1992). What

[30] This result must be tempered by the lower number of individual votes cast under the different specific political conditions in democratic government – all 'non-fragmented' conditions occur in the pre-1973 democratic period.

political conditions facilitate judicial decisions that check power and ensure constitutional rights; and what conclusions can we draw concerning the expansion of rights protections at least in these cases, and perhaps more broadly? The results of the simple quantitative analysis indicate that judges do not play the same role in every policy arena. Factors (such as political competition, transparency and fragmentation, or alternation from government to opposition) associated with politically contentious issues concerning the boundaries of power are not necessarily the same factors that may facilitate the development of a more activist stance toward rights.

Both broad explanations examined here—judges as unconstrained ideologues vs. judges as astute politically constrained policy seekers—are concerned with judicial deference power and weak rights protections. In the first case we might argue that judges view deference to state power and to the legislature sincerely as their role. Under conditions of political fragmentation they will simply 'prefer' deference sincerely. In the second case, judges 'choose' deference as a strategy to avoid the personal or institutional political 'harm' of major or minor court-curbing actions taken by the president or his/her supporters in the legislature. Political fragmentation can only be expected to facilitate judicial rights protections if guaranteeing rights constitutes part of individual judges' sincere preferences (the ideological and political preferences judges bring to the bench). There exists, however, significant skepticism about the 'rights' content of judicial preferences in both countries.

Argentine judicial attitudes are characterized by "unfounded conservativism or lack of commitment to democracy" (Gargarella 2004, 194). The performance of the Chilean high courts concerning liberal constitutional rights has been described as "disappointing" or "irrelevant" (Couso 2004; Couso 2005). Moreover, the explanation for this record has largely focused on aspects internal to the court: the predominance of a private law approach to

constitutional adjudication, the presumption of constitutionality given formal law, and an apolitical institutional ideology that has been nurtured within the judiciary (particularly by the Supreme and appellate courts) by institutional stability and insulated appointment procedures (Couso 2005; Hilbink 2007). The results largely substantiated this view for Chile with respect specifically to freedom of expression. The implication is that advancing rights would require replacing the judicial hierarchy with individuals ideologically committed to checking state and power and promoting a liberal-rights-oriented jurisprudence.

On the other hand, the results for both countries, but particularly for Chile, indicate that the external political environment in which judges decide contentious cases concerning *power* partially impacts decision making. Gargarella (2004) asserts that in Latin America, judges do not face institutional or organizational "incentives to do things like defend democracy or protect disadvantaged minorities" (194). Yet, this analysis suggests that judges may face political incentives to do so. In the context of challenges to presidential use of exceptional power, judges were substantially more likely to support executive power when presidents enjoy significant political resources in the legislature; and this was especially the case for judges who were *not* appointed by the president (or a president of the same party) politically similar president. In short, the results indicate that judges may strategically defer to presidents who have congressional support, specifically on questions related to power. Decision making on rights is associated with 'private' ideological preferences (or attributes of individual justices), while judicial decision making on questions of power is, comparatively, 'political.' The results simply point to the salience of the political environment in some contexts (power), but not in others (rights), at least for the countries examined here. The analysis appears to be consistent with Shapiro's (2004, 21-25) two-step evolution of rights based constitutional review, where narrow rule of law jurisprudence establishes the

foundations for more confrontational right-based constitutional review in the future. The question remains, however, what interactive processes underpin that evolution.

One of the pillars supporting the continuity of judicial conservativism toward constitutional adjudication and a self-conception of apoliticism in Chile is the absence of an alternative basis for the legitimacy of judicial decisions (Correa Sutíl 1988). Judges will not injure or destroy judicial power and they will not attempt to expand their power beyond the limits which would be legitimate under traditional theory of the judicial function (Murphy 1964). Without a public consensus about what alternative principles and reasoning should govern judicial activity, judges (even constitutional judges aware of their political role) are unlikely to leave the safety of the traditional model of legitimacy, especially in cases concerning the boundaries of power. To the extent that the dominance of positivist cultural norms surrounding the definition of the judicial role perpetuates the thinking that presidents should not be hampered in their efforts to provide for the common good but rather supported by the legislature and the judiciary (Merryman 1985; Merryman 1994; Rosenn 1974; Rosenn 1987), judges who leap from the frying pan of review of legality of presidential action to the fire to the review of constitutionality are particularly vulnerable to charges that they have overstepped the acceptable boundaries of judicial power. The implication is that the Chilean Supreme Court, in particular, is unlikely to suddenly embrace an activist role with respect to constitutional review.[31] In short, without an alternative and widely held definition of legitimate judicial action, judicial advancement of strong counter-majoritiarian rights protections (a 'rights revolution') would not serve the institutional goals of the judiciary well (Rasmusen 1994).

[31] See also Zúñiga Urbina (2006, 169)

The larger point here is whether (and how) the 'private' institutional-ideology of the judiciary is dependent upon public 'political' expectations for judicial activity. The authority courts may depend less on formal institutional power, than it does on the ability of judges to 'mobilize other centers of power in support of their claims to authority.'[32] To the extent that authority partially rests on legitimacy, there may be substantially more play between the 'private' institutional-ideology and external 'political' factors at work in judicial decision-making—factors not necessarily associated with political fragmentation (Rasmusen 2004; Gibson, Caldeira, & Baird 1998) or captured by a simple dichotomous coding of judicial decisions (Staton & Vanberg 2008). In short, if the crucial missing piece (particularly for a rights-based culture of 'judging' or 'democratic justice') is a supportive model of legitimate judicial action, we might be less concerned with how judges see themselves and more concerned with what others expect of judges.

Judges face a complex political and judicial environment and multiple audiences, including the other branches of government and political parties, the lower levels of the judiciary and the wider legal community, interest groups and vocal activists, and the press and general public. Judges must 'tactically balance' potentially competing institutional, legal, political and economic imperatives" when deciding contentious cases (Kapiszewski 2007, 221). The view of courts as politically constrained as examined above is concerned narrowly with legislative-executive-court dynamics that tend to keep courts from straying too far from majority political positions and/or help to explain the development of 'soft review' (Epstein Knight & Shvetsova 2001).[33] However, public opinion broadly, and NGO activism

[32] O'Donnell (1998b) quoting Arthur L. Stinchcombe, *Constructing Social Theories* (Chicago: University of Chicago Press, 1987), 159-63 on the concept of 'legitimacy.'

[33] Epstein Knight & Shvetsova (2001) argue that "a new court avoids reaching decisions outside the tolerance intervals of other institutional players, preferring instead to promote its legitimacy and adjust the stats quo policy slowly" (138). Deciding cases within the tolerance set of other actors ('soft' review) serves to lengthen

specifically, may influence judicial behavior, either indirectly, through pressuring the political branches to comply with judicial decisions (Vanberg 2005; Staton 2006), or directly by pressuring the courts through demonstrations, advocacy, and litigation (Smulowitz and Peruzzotti 2000; Mishler and Sheehan 1993). Thus, on the one hand judges might be more likely to hold power accountable (or uphold rights) if they enjoy popular support such that it becomes politically costly for politicians to ignore or challenge the court (López-Ayllón & Fix-Fierro 2003; Staton 2002).

On the other hand, social actors, in large part because they change public meanings about what is and is not acceptable, expected, or possible behavior from courts, likely independently impact these separation of powers dynamics (as well as others not captured through a narrow separation of powers analysis). In short, popular (publically held) expectations about rights and judicial behavior may impact judicial behavior. Brinks' (2008) study of judicial response to police killings, for example, demonstrates the importance of external political pressure on courts. In the case of Buenos Aires popular NGO-driven political efforts and increased legal assistance had a positive impact on the prosecution of police. In Uruguay, where Brinks finds the best outcomes for police prosecution, there is a greater public expectation and political pressure for successful prosecution. Such legal mobilization by rights advocates (with sufficient resources) is at the heart of Epp's (1998) explanation for a rights revolution comparatively.

In both Argentina and Chile, issue-specific organizations and interest groups increasingly have pursued judicial strategies of policy change and pressed for rights

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the 'tolerance intervals' of those actors, giving the court wider berth in accepting and deciding cases in line with court's preferences. Moreover, the rising legitimacy of the court (associated with rulings within the margins of the tolerance interval) raises the costs faced by other political actors of challenging (or punishing) the court, which also contributes to giving courts greater political room for maneuver in deciding cases in line with their policy preferences.

protections across a wide variety of cases including those impacting both emergency authority (particularly in Argentina) and freedom of expression (and more so currently, than in the time frame considered in the quantitative analysis). However, the lack of a supportive culture of rights specifically on the bench is cited as a substantial stumbling block in both Argentina (Gargarella 2004) and Chile (Couso 2005). Nonetheless, the UK experienced an emergent moderate rights revolution absent substantial change on the bench (and absent major constitutional change), largely due to the "growing availability of resources and the growing aggressiveness of legal activists" (Epp 1998, 155). This raises the question of whether (and, again, how) strategies of legal motivation potentially shape widely shared public, political and judicial expectations for legitimate judicial action, particularly on questions of rights.[34] The question is complicated by potential role of that external jurisprudential and doctrinal pressure exerted by the Inter-American Court of Human Rights could have on member countries (particularly given that legal strategies have increasingly involved referral to the Inter-American Commission). While these questions are clearly beyond the scope of this paper, they point to an expanding research agenda in judicial politics that explores the dynamic interaction between judges facing multiple and shifting audiences and an increasingly complex political and legal environment.

[34] This question is particularly interesting in the case of Chile where the 2005 constitutional reforms ostensibly concentrated constitutional review in the Constitutional Tribunal. Individual petitioners are now bringing rights-based claims under the writ of applicability directly to the Tribunal. Of the 236 total cases brought before the TC in 2006 (the first year that the TC took on inapplicability cases), 206 were writ of inapplicability cases. The TC has generally maintained the narrow admissibility rules developed by the Supreme Court (Saenger G. 2007). However, there are auspicious examples, such as 2007 writ of inapplicability case recognizing a right of access to information (as essential for freedom of expression and a democratic regime broadly), that indicate a rights-based jurisprudence, at least on the TC, will develop with time (see: *Casas Cordero et al v. The National Customs Service* (Rol Nº 634, August 9, 2007), written by Marisol Peña Torres). Of course there are also counter examples, such as the ideologically charged 2008 decision overturning public provision of the morning after pill, which was roundly criticized and greeted by large public protests.

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Table 1: Logistic regression results for Argentina (1946-1999)

	DV: Check Exceptional Power		DV: Ensure Freedom of Expression	
	Model(1)	Model(2)with interaction	Model(3)	Model(4) with interaction
Date of Case	0.000	0.000	0.000	0.000
	(4.90)**	(5.09)**	(0.69)	(0.85)
Contemporary case	0.471	0.446	-0.297	-0.289
	(1.29)	(1.21)	(1.34)	(1.30)
Important case	0.208	0.228	0.067	0.059
	(1.15)	(1.25)	(0.47)	(0.41)
Regime type (democracy)	-1.437	-1.285	0.103	0.171
	(4.67)**	(4.07)**	(0.41)	(0.67)
State of siege declaration in effect	-0.742	-0.676	-0.779	-0.759
	(2.83)**	(2.54)*	(3.46)**	(3.36)**
Judge not appointed by President	0.608	0.215	0.432	0.145
	(2.30)*	(0.61)	(2.48)*	(0.56)
Proportion the of Court appointed by the President	0.037	0.039	0.345	0.365
	(0.06)	(0.06)	(0.85)	(0.89)
Political fragmentation	0.522	0.220	-0.012	-0.170
	(1.91)	(0.68)	(0.07)	(0.84)
Interactive effect of judicial appointment relationship and political fragmentation		0.835		0.490
		(1.71)		(1.51)
Constant	-1.076	-1.136	-0.359	-0.388
	(1.36)	(1.41)	(0.73)	(0.79)
Observations	761	761	888	888
Pseudo R2 (STATA)	0.1220	0.1251	0.0349	0.0367
Absolute value of z statistics in parentheses				
* Significantly different from 0 with at least 95% confidence in a one-tailed test ** Significantly different from 0 with at least 99% confidence in a one-tailed test				

Table 2: Logistic regression results for Chile (1932-1999)

	DV: Check Exceptional Power		DV: Ensure Freedom of Expression	
	Model(1)	Model(2)with interaction	Model(3)	Model(4) with interaction
Date of Case	0.000	0.000	0.000	0.000
	(4.12)**	(4.16)**	(0.21)	(0.27)
Contemporary case	-1.697	-1.723	1.203	1.199
	(2.58)**	(2.59)**	(2.51)*	(2.50)*
Important case	0.302	0.315	-0.190	-0.192
	(1.84)	(1.91)	(1.03)	(1.04)
Regime type (democracy)	-1.635	-1.346	2.196	2.079
	(1.39)	(1.14)	(2.31)*	(2.18)*
State of siege declaration in effect	0.480	0.625	0.295	0.263
	(1.12)	(1.44)	(0.49)	(0.43)
Judge not appointed by President	0.330	0.116	0.053	0.343
	(1.93)	(0.61)	(0.26)	(1.06)
Proportion the of Court appointed by the President	-0.634	-0.050	0.753	0.633
	(1.09)	(0.08)	(1.22)	(1.02)
Political fragmentation	3.051	2.405	-1.397	-1.071
	(2.54)*	(1.96)*	(2.17)*	(1.52)
Interactive effect of judicial appointment relationship and political fragmentation		1.071		-0.460
		(2.65)**		(1.14)
Constant	-0.931	-1.233	-2.165	-2.219
	(1.30)	(1.69)	(2.21)*	(2.26)*
Observations	813	813	543	543
Pseudo R2 (STATA)	0.1217	0.1286	0.0307	0.0324
Absolute value of z statistics in parentheses				
* Significantly different from 0 with at least 95% confidence in a one-tailed test ** Significantly different from 0 with at least 99% confidence in a one-tailed test				